SUBCLASSES—THE TEST CASE CONCEPT—*EISEN V. CARLISLE & JACQUELIN*

I. INTRODUCTION

In 1966, Morton Eisen filed a class action in the United States District Court for the Southern District of the state of New York. Eisen charged the country's two largest dealers in odd-lots,[1] Carlisle & Jacquelin and DeCoppet & Doremus,[2] with violations of the antitrust laws. It was later estimated by the district court judge that the class defined by Eisen consisted of about 6,000,000 members of which 2,000,000 were identifiable.[3] Although the district court held, after

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[1] Normal trading units on stock exchanges are in multiples of 100 shares called "round-lots." The term "odd-lot" is used to describe transactions involving less than 100 shares.

[2] It has been estimated that Carlisle & Jacquelin and DeCoppet & Doremus handle ninety-nine percent of the volume of odd-lot transactions on the New York Stock Exchange. SEC, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS pt. II, at 172 (1963).

[3] Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 257 (S.D. N.Y. 1971). Because of the number of decisions generated by this case, abbreviated names have been given the opinions. The following table lists the decisions in chronological order and shows the shortened name of each as it will appear in this note:

Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D. N.Y. 1966)
—*Eisen (D.C.) I* (held the action could not be maintained as a class action because Eisen could not fairly and properly represent other members of the class);

Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966)
—*Eisen I* (held the decision to dismiss Eisen's class action was appealable under the "death knell" doctrine since it would for all practical purposes terminate litigation in view of Eisen's seventy dollar individual claim);

Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968)
—*Eisen II* (reversed dismissal of class action);

Eisen v. Carlisle & Jacquelin, 50 F.R.D. 471 (S.D. N.Y. 1970)
—*Eisen (D.C.) II* (held that the issues of manageability and notice required further consideration);

Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D. N.Y. 1971)
—*Eisen (D.C.) III* (held that the suit was maintainable as a class action and that the circumstances of the case warranted a preliminary hearing on the merits as a prelude to possible apportionment of costs of notice between plaintiff and defendants);

Eisen v. Carlisle & Jacquelin, 54 F.R.D. 565 (S.D. N.Y. 1972)
—*Eisen (D.C.) IV* (held that Eisen was more than likely to prevail on the merits and that defendants would be required to bear ninety percent of the costs of notice);

Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973)
—*Eisen III* (held that the action was not maintainable as a class action because of manageability problems, rejected the fluid recovery device, rejected the preliminary hearing on the merits, and held that individual notice to all identifiable class members was required by Rule 23);

the much noted minihearing on the merits,[4] that Eisen's class was "more than likely to prevail" on the merits of the case,[5] the United States Supreme Court held that no determination on the merits would be allowed until the identified members of the class were notified.[6] As a practical matter, the cost of such notice put an end to the entire suit. The Eisen case has been extensively commented upon at all stages.[7] This note will focus upon the suggestion, made by Judge Oakes[8] in the circuit court of appeals and in the Supreme Court by Justice Douglas,[9] that this action might be pursued if the gargantuan class alleged by Eisen were divided into smaller more manageable subclasses.

II. THE SUGGESTION

Judge Oakes succinctly stated the problems that he felt might be generated by the decision.

> The panel opinion seems on its face to give a green light to monopolies and conglomerates who deal in quantity items selling at small prices to proceed to violate the antitrust laws, unhampered by any realistic threat of private consumer civil proceedings, leaving it to some vague future act of Congress to protect the innocent consumer. The panel opinion as I read it tells polluters that they are pretty safe from class actions because even if a whole city is blanketed in smoke or its water supply contaminated, the plaintiffs can never advance the money for notices to, say, all the people in the city phone book, who certainly are identifiable.[10]

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974)

—*Eisen* (held individual notice to all identifiable class members was required by rule 23 and that the preliminary hearing on the merits was improper).

[4] The preliminary hearing on the merits, often referred to as a "minihearing," was first used in Dolgow v. Anderson, 43 F.R.D. 472 (E.D. N.Y. 1967). The minihearing on the merits has been the subject of numerous law journal articles. *See, e.g.*, Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 303-04 (1973); Note, 54 B.U.L. REV. 111, 127-35 (1974) (comparing the *Eisen (D.C.) IV* minihearing with the *Dolgow v. Anderson* minihearing); Casenote, 40 U. COLO. L. REV. 462 (1968) (discussing the *Dolgow v. Anderson* minihearing with approval).

[5] *Eisen (D.C.) IV*, 54 F.R.D. at 567.

[6] *Eisen*, 417 U.S. at 178-79.

[7] So many articles have been written about the *Eisen* case that it would be fruitless to even attempt to list them all. One student article which covers almost every issue in the case is Note, 54 B.U.L. REV. 111 (1974).

[8] Judge Oakes, joined by Judge Timbers, dissenting from the decision of the Second Circuit denying a petition for a rehearing *en banc*, *Eisen III*, 479 F.2d at 1021.

[9] Justice Douglas, joined by justices Brennan and Marshall, dissenting in part, *Eisen*, 417 U.S. at 179.

[10] *Eisen III*, 479 F.2d at 1022 (dissent from court's refusal to hear the case *en banc*).

Judge Oakes felt that even it were proper to require that individual notice be sent to all identifiable members of Eisen's class and to tax the costs of such notice to Eisen, the circuit court had erred in not considering "one of several other alternatives to the panel's burial of larger-number plaintiff class actions."[11]

> The plaintiff class might, for example, be divided into much smaller subclasses . . . of odd lot buyers for particular periods, and one subclass treated as a test case, with the other subclasses held in abeyance. Individual notice at what would probably be a reasonable cost could then be given to all members of the particular small subclass who can be easily identified.[12]

Justice Douglas quoted Judge Oakes in his separate opinion in *Eisen*, and in a similar vein, continued:

> Or a subclass might include those on monthly investment plans, or payroll deduction plans run by brokerage houses. The possibilities, though not infinite, are numerous.
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> The power to create a subclass is clear and unambiguous. Who should be included and how large it should be are questions that only the District Court should resolve. Notice to each member of the subclass would be essential under Rule 23(c)(2); and under Rule 23(c)(2)(A) any notified member may opt out. There would remain the question whether the subclass suit is manageable. But since the subclass could be chosen in light of the nonmanageability of the size of the class whose claims are presently before us, there is no apparent difficulty in that sense.[13]

These opinions suggest a novel approach to the problems presented by actions pursued by gargantuan classes. Instead of forcing a possibly meritorius action to be dismissed solely because of the expense of notifying the class members, the class could be divided into small subclasses. Both opinions suggest that the division of the class could be made upon lines which would make notice economically feasible, permitting the action to continue pursued by the separate subclasses. Judge Oakes took this line of reasoning even one step further. He suggested that, after the division of the class, one of the subclasses could pursue the action as a "test case."[14] Presumably, a decision on the merits of the test case would be binding on all parties on both sides of the action and would make further litigation of the

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[11] *Id.* at 1023.

[12] *Id.*

[13] *Eisen*, 417 U.S. at 180-81 (footnote omitted).

[14] *Eisen III*, 479 F.2d at 1023.

issues determined in the test case unnecessary. This note will examine the problems inherent in a subdivision of a class, as well as the effects that a final judgment on the merits in a test case pursued by one of the resultant subclasses would have upon the rights of members of the nonlitigating subclasses.

III. DIVISION OF THE CLASS

Rule 23(c)(4)(B) vests the district courts with the discretionary power to divide a class into subclasses. The rule, however, sets forth no criteria for making such a division, although it does provide that each subclass is to be accorded class treatment under rule 23.[15] The usual situation in which a court will divide a class into subclasses occurs when the class contains members whose interests are divergent or antagonistic.[16] In such a situation, it would be proper for the court to divide the class into nearly homogeneous subgroups in order to separate the adverse and atypical members of the class.

There is no indication that the class alleged by Eisen, consisting of all odd-lot purchasers who were allegedly charged excessive fees in violation of the law,[17] contained members whose interests were clearly divergent from, or antagonistic to, the interests of the class as a whole. Futhermore, it was judicially determined that Eisen would adequately represent the claims of the class.[18] Thus, none of the factual situations that traditionally justify the division of a class into subclasses were present in the *Eisen* case. The only apparent justifications for dividing Eisen's class are unrelated to the interests of the class members—division of the class in order to make the action

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[15] FED. R. CIV. P. 23(c)(4):

When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

[16] 7 C.A. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1790 at 189 (1972).

[17] Odd-lot transactions are exclusively handled by special odd-lot dealers. The cost of an odd-lot purchase to a consumer includes both a standard brokerage commission and the odd-lot differential. The differential is a figure amounting to a fraction of a point for each share traded that is added to the customer's purchase price and subtracted from the sale price. During the period at issue in the *Eisen* case, the odd-lot differential was ⅛ of a point (12-½ cents) per share of stock selling below $40 per share and ¼ of a point (25 cents) per share on stock selling above $40 per share.

It was Eisen's contention that the odd-lot differential was set at an excessive amount during the time in controversy in violation of the antitrust laws.

[18] *Eisen (D.C.) III*, 52 F.R.D. at 261.

more manageable, or division of the class to allow a possibly meritorious action to proceed when the costs would otherwise be prohibitive. There is no precedent for dividing a class into subclasses for either of these reasons.

The only judicial supports for dividing a class into subclasses purely for manageability or economic reasons are the opinions of Justice Douglas and Judge Oakes, although neither of these opinions discussed the justifications for such a division. Both opinions merely stated that the power to divide a class into subclasses existed and it could be used in this manner.

In order to comply with the prerequisites for the maintenance of a class action contained in rule 23(a), the existence of a class must be shown.[19] Thus classes may not be constructed along purely fanciful lines in order to create a class of desirable qualities (*e.g.*, complete diversity). Classes must be formed upon rational dividing lines that generally correspond to the interests of the members.[20] Thus any subdivision of a class should be along lines related to the interests of the members of the class and precisely enough defined so that the interests of a single class member for a single transaction would be represented by but one subclass. As observed by Justice Douglas, the membership and size of each subclass are matters uniquely within the competence of the trial court.

Assuming that a division of the class can be made, as suggested by Oakes and Douglas, it becomes necessary to decide who should be given notice of the action. Rule 23 provides that all members of a rule 23(b)(3) class (Eisen's action involved such a class) will be bound by the outcome of any action brought on their behalf unless they request exclusion from the suit.[21] Rule 23 also provides that, after the division of a class into subclasses, each subclass is to be accorded class treatment.[22] It is clear, therefore, that the members of any liti-

[19] This requirement is inherent in the requirement, stated in rule 23(a), that "[o]ne or more members *of a class* may sue or be sued . . . ." (emphasis added). See 7 C.A. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1760 (1972).

[20] This is specifically required by FED. R. CIV. P. 23(a)(2) which requires that there be questions of law or fact common to the class.

[21] FED. R. CIV. P. 23(c)(2):

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

[22] FED. R. CIV. P. 23(c)(4).

gating subclass would be bound by the outcome of that subclass action unless they affirmatively requested exclusion from the proceeding. The Supreme Court decision in *Eisen* makes it clear that all identifiable members of a litigating subclass would have to be given notice of the pendency of the action in order to comply with the requirements of rule 23.[23]

IV. THE TEST CONCEPT

The appeal of the test class concept is that in a single action the rights and duties of all of the interested persons can be determined finally, making further litigation of the issues determined in the test case unnecessary. It is elementary that for an action to be completely effective in this manner, all of the interested persons involved must be bound by the outcome of the test case. There are only two ways in which all of the persons actually interested in the subject matter of the dispute (*i.e.* the defendants and the members of the original class) can be bound by litigation involving only a subclass of such persons: (1) all of the individuals can agree in a legally enforceable manner to be bound by the outcome of the test case,[24] or (2) all of the interested persons can be bound by the test case as a matter of law.

In the situation posed by the *Eisen* case, the first alternative of an agreement to be bound is clearly impractical. There is no reason to believe that the notice that would be required to solicit the agreement of all members of Eisen's class to be bound by the outcome of the test case could be accomplished more cheaply than could the notification of all identifiable members of Eisen's class in order to afford them an opportunity to opt out of the action. Since the expense of notifying the class is what put an end to the Eisen suit, the expense of soliciting the agreement of all class members to be bound by a test case would also be prohibitive.

The only situation in which the subclass litigation could practically serve as an actual test case would be where all interested parties would be bound by the outcome of the test case as a matter of law. Stated another way, the concept is workable only if the final decision in the test case would preclude all interested persons from relitigating the issues determined in the test case. There are two factors that must be considered in determining the preclusive effect of a final judgment on the merits in the test case upon members of the nonlitigating

[23] *Eisen*, 417 U.S. at 173.

[24] *See* Note, 35 GEO. WASH. L. REV. 1010, 1048 (1967).

subclasses: (1) notions of due process of law requiring that some notice be given to those who are to be bound by an action,[25] and (2) the law concerning the application of collateral estoppel and res judicata. As shown below, these two factors interact in such a way that the ideal function of the test case concept is simply unworkable in the situation posed by the *Eisen* case.

A. Due Process of Law and Notice

Courts have often held that due process of law prohibits binding a person by the judgement of an action of which he had no notice or in which he has no opportunity to appear.[26] Binding a person in such a situation violates basic values of our judicial system: the right of a litigant to present his arguments to a court before having his rights adjudicated and the importance of this personal participation to the fairness of the resultant decision. One of the more frequently utilized corollaries of this rule is that a stranger to an action cannot be estopped on the basis of a judgment in that action.[27] It has been said that the determination of a litigant's rights without affording that person an opportunity to personally participate in the action undermines the capacity of the courts to command respect for their decisions.[28]

Since the fundamental requirement of due process is an opportunity to be heard, the notice of the pendency of an action must be of such nature so as to reasonably convey the required information.[29] Rule 23(c)(2), as construed by the Supreme Court in *Eisen*, requires

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[25] This contention is supported by cases such as Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Katz v. Carte Blanche Corp., 53 F.R.D. 539 (W.D. Pa. 1971); and Cusick v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 317 F. Supp. 1022 (E.D. Pa. 1970). *See also* collection of cases in 16 AM. JUR.2D *Constitutional Law* § 560 (1964); 7 C.A. WRIGHT & A. MILLER, *supra* note 16, § 1786 at 140; Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)*, 81 HARV. L. REV. 356, 396 (1967); Mariaist & Sharp, *Federal Procedure's Troubled Marriage: Due Process and Class Action*, 49 TEXAS L. REV. 1, 9 (1970); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 939 (1958).

[26] *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Milliken v. Meyer, 311 U.S. 457 (1940); Granis v. Ordean, 234 U.S. 385 (1914); Roller v. Holly, 176 U.S. 398 (1900); and Pennoyer v. Neff, 95 U.S. 714 (1877).

[27] *See, e.g.*, Blonder-Tongue Labs., Inc. v. Univ. of Illinois Foundation, 402 U.S. 313, 329 (1971); Hansberry v. Lee, 311 U.S. 32, 40 (1940); Postal Tel. Cable Co. v. City of Newport, 247 U.S. 464, 476 (1918); and Old Wayne Mut. Life Ass'n. v. McDonnough, 204 U.S. 8, 17 (1907).

[28] *See, e.g.*, Note, 87 HARV. L. REV. 1485, 1497 (1974) and Vestal, *Rationale of Preclusion*, 9 ST. LOUIS L. J. 29, 33-34 (1964).

[29] This was the fundamental holding of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

that all identifiable members of a rule 23(b)(3) class be sent individual notice of the pendency of the action that informs them either to affirmatively opt out of the action or be bound by the outcome. Since rule 23(c)(4)(B) provides that each subclass shall be afforded class treatment, rule 23(c)(2) would require that notice be sent to all identifiable members of the litigating subclass (assuming the action was brought pursuant to rule 23(b)(3), as was the case in *Eisen*). There is no requirement that notice be sent to members of other subclasses since each subclass will be afforded class treatment separately and each person will be notified when his or her particular subclass is preparing to litigate. In any event, a member of one subclass would not be afforded the opportunity to appear or to opt out of an action pursued by a different subclass.

Thus it is obvious that the defendants cannot use the judgment in an action pursued by one subclass to bind the members of another subclass, because the members of the nonlitigating subclass were given neither notice nor an opportunity to enter an appearance as required by due process of law.[30] Certainly, this seems to be the result intended by the drafters of the rule. The advisory committee's note to rule 23 explicitly states that the requirement of notice to all identifiable members of a rule 23(b)(3) class is intended to meet the requirements of due process.[31] The Supreme Court relied exclusively upon the advisory committee's note to rule 23 and two cases dealing with the due process requirements of notice[32] in reaching the decision in *Eisen* that rule 23 requires individual notice to all identifiable members of a rule 23(b)(3) class; this reasoning lends strength to the proposition that due process would prohibit binding the members of one subclass by the judgment in an action pursued by a different subclass.

These due process considerations are less compelling where a nonlitigating subclass is attempting to use a favorable judgment in the test case *offensively* against the defendants. In this situation, the parties against whom the preclusive effect of the prior judgment is urged (the defendants in the *Eisen* situation) were parties to the prior action. Not only would the defendants have received notice of the action, but they presumably would have appeared and defended. Futhermore, the preclusive effect of a prior judgment is generally

[30] See authorities cited *supra* note 24.

[31] Advisory Committee's Note to Rule 23, 39 F.R.D. 69, 107 (1966).

[32] The Court cited only *Mullane*, *supra* note 25 and Schroeder v. City of New York, 371 U.S. 208 (1962), in its discussion of the requirements of rule 23(c)(2) notice. *Eisen*, 417 U.S. at 175.

permitted by the courts when the prior action was "fully and fairly litigated."[33] Thus, it would appear that due process considerations alone would not prohibit the utilization of the judgment in the test case against the defendants by members of subclasses other than the test class.

B. *Res Judicata-Collateral Estoppel*

Since it has already been shown that notions of due process prohibit binding the members of nonlitigating subclasses by an unfavorable judgment in the test case, it is unnecessary to discuss the effects of the concept of collateral estoppel on the members of the nonlitigating subclasses. As previously indicated however, due process considerations are unlikely to prohibit the nonlitigating subclasses from asserting the preclusive effect of the judgment in the test case against the defendants. Therefore, in order to complete the analysis of the binding effect of a final judgment in a test case, it is necessary to consider whether collateral estoppel could be utilized by nonlitigating subclasses to preclude the defendants from relitigating issues determined in the test case.

Collateral estoppel, sometimes referred to as issue preclusion,[34] is a facet of res judicata. Roughly speaking, collateral estoppel precludes a party in one action from asserting or denying an issue that has been conclusively determined in a prior suit in which the party or his privy has participated.[35] A traditional requirement for the assertion of the preclusive effect of an issue determined in a prior action is mutuality of estoppel. Mutuality requires that the party seeking to assert the preclusive effect of the prior judgment must himself have been bound by that prior judgement.[36]

In the test case situation posed, where one subclass is taken as a test case and litigates the action to a final judgment on the merits, it

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[33] *See, e.g.*, Zdanok v. Glidden Co., 327 F.2d 944, 956 (2d Cir. 1964); Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 606-07, 375 P.2d 439, 441, 25 Cal. Rptr. 559, 561 *cert. denied*, 372 U.S. 966 (1963).

[34] Allan D. Vestal is the commentator who first suggested that the confusion between the terms "res judicata" and "collateral estoppel" could be avoided by substituting for them the terms "claim preclusion" and "issue preclusion" respectively. Professor Vestal has written a great many articles dealing with both res judicata and collateral estoppel. *See, e.g.*, Vestal, *The Constitution and Preclusion/Res Judicata*, 62 MICH. L. REV. 33 (1963); Vestal, *Preclusion/Res Judicata Variables: Nature of the Controversy*, 1965 WASH. U.L.Q. 158; Vestal, *Procedural Aspects of Res Judicata/Preclusion*, 1969 U. TOL. L. REV. 15.

[35] Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 302-03 (1961).

[36] Greenebaum, *In Defense of the Doctrine of Mutuality of Estoppel*, 45 IND. L.J. 1 (1969).

is clear that strict application of the doctrine of mutuality of estoppel would prevent both the nonlitigating subclasses or the defendants from taking advantage of the test case judgment. First, the nonlitigating subclasses cannot be bound by the judgment in the test case since they would not have had the notice of the action or the opportunity to appear required by due process of law. Since the defendants could not have used a favorable judgment to preclude members of nonlitigating subclasses from relitigating issues determined in the test case, the doctrine of mutuality of estoppel would prohibit members of the nonlitigating subclasses from utilizing a judgment in the test case to bind the defendants. If mutuality of estoppel were to be strictly applied in this situation, it is clear that the test case concept could never perform its proper function of binding all of the persons interested in the action and eliminating the necessity of further lawsuits.

There is no question that the doctrine of mutuality of estoppel has been greatly eroded in recent years.[37] The demise of the requirement of mutuality was first signaled by the landmark decision of *Bernhard v. Bank of America National Trust & Savings Association*.[38] The reasoning of *Bernhard* has been recognized not only by numerous commentators, but by the Supreme Court itself.[39] In *Bernhard*, Justice Traynor set forth what has come to be known as the *Bernhard* doctrine of collateral estoppel:

> The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided . . . . He is bound by that litigation only if he has been a party thereto or in privity with a party thereto . . . . There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.

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[37] The erosion of the requirement of mutuality has been generally, but not universally, praised. Some articles in support of the demise of mutuality are the following: Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965); Note, 52 CORNELL L.Q. 724 (1967); and Note, 47 N.C.L. REV. 690 (1969). Articles which defend the mutuality requirement include: Greenebaum, *In Defense of the Doctrine of Mutuality of Estoppel*, 45 IND. L.J. 1 (1969); Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961) and Seavey, *Res Judicata with Reference to Persons Neither Parties Nor Privies*, 57 HARV. L. REV. 98 (1943).

[38] 19 Cal. 2d 807, 122 P.2d 892 (1942).

[39] Blonder-Tongue Labs., Inc. v. Univ. of Illinois Foundation, 402 U.S. 313, 323-24 (1971).

> No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend . . . .
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> In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?[40]

Commentators generally agree that there are four basic factors underlying the doctrine of collateral estoppel: (1) the doctrine helps end litigation,[41] (2) it protects private litigants from the necessity of litigating the same cause of action or issue more than once,[42] (3) it allows each litigant to have his day in court,[43] and (4) it fosters the stability of judgments.[44] There is also general agreement that other factors should influence any decision dealing with a plea of collateral estoppel.[45] It is important to note that many courts have placed limitations upon the assertion of a plea of collateral estoppel, one of the most common being a limitation of collateral estoppel to defensive use only.[46]

Applying these new concepts of collateral estoppel to the test case situation, it appears that there is only one combination of circumstances in which a court would allow the nonlitigating subclasses to preclude the defendants from relitigating the issues determined in

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[40] 19 Cal. 2d at 811-13, 122 P.2d at 894-95.

[41] Vestal, *Preclusion/Res Judicata Variables: Adjudicating Bodies*, 54 GEO. L.J. 857 (1966).

[42] Comment, 18 VILL. L. REV. 207, 211 (1972).

[43] Vestal, *supra* note 3.

[44] Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 606, 375 P.2d 439, 441 (1962).

[45] The most important of those considerations are: Would the application of collateral estoppel under the unique circumstances of the case under consideration lead to anomalous results? Did the party against whom the plea is asserted have the ability and incentive to litigate the issue or issues to be precluded to the utmost in the prior action? Did the party against whom the estoppel is asserted have a full and fair opportunity to contest the decision asserted to be conclusive? *See* Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965); Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); Note, 41 MISS. L.J. 497 (1970); and Note, 52 N.C.L. REV. 836, 846 (1974).

[46] For a discussion of the offensive/defensive distinction, *see* Note, 35 GEO. WASH. L. REV. 1010 (1967) and Note, 47 N.C.L. REV. 690, 692-94 (1969). For an exhaustive statement of the *Bernhard* doctrine in courts outside California, including the offensive/defensive distinction, *see* Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 38-46 (1965).

the test case. First, the jurisdiction in which the subsequent action was brought would have to be one which had not only discarded the mutuality of estoppel doctrine, but also allowed the preclusive effect of a prior judgment to be utilized offensively by a nonparty to that prior action. In addition, the issues in the test case must have been determined in such a manner that the court in the subsequent action would hold those issues to have been fully and fairly litigated. In this situation, a court could allow the nonlitigating subclasses to bind the parties opposing the class to the judgment in the test case. This state of affairs would be extremely advantageous to the nonlitigating subclasses. If the judgment were against the class, notions of due process would prevent them from being bound by the test case judgment; if the judgment were against the defendants, the nonlitigating subclasses could utilize that judgment offensively to preclude the defendants from denying liability in a subsequent action. This would not, however, achieve the goals for which the subclass and test case concepts were suggested, since the members of nonlitigating subclasses could still not be bound by an unfavorable judgment if they had received no notice.

There are few cases dealing with the application of the principles of preclusion that are direct authority for the proposition that, at least in the federal court system, collateral estoppel may properly be asserted in a subsequent action by a nonparty to the first action against a party to the prior action. In *United States v. United Air Lines, Inc.*,[47] the district court held, and the Court of Appeals for the Ninth Circuit affirmed, that the plaintiffs were entitled to summary judgment on the grounds that in a prior action based on the same operative facts but pursued by different plaintiffs, the defendants had been adjudicated negligent. The case involved the collision over Nevada of a United Air Lines passenger plane with a United States Air Force jet. The crash killed all forty-two passengers and five crew members of the United plane and both Air Force pilots. Actions were brought by survivors of the deceased passengers in eleven different jurisdictions.[48] The first suit to reach a final decision was in a California federal district court and resulted in a judgment for the plantiff on the issue of the airline's negligence. The plaintiffs in Washington moved for summary judgment on the theory that the California judg-

[47] 216 F. Supp. 709 (E.D. Wash. 1962), *aff'd sub nom.* United Air Lines v. Wiener, 335 F.2d 379, 404 (9th Cir.) (adopting district court's discussion of mutuality of collateral estoppel), *cert. dsm'd*, 379 U.S. 951 (1964).

[48] Suits are filed in United States district courts in California, Florida, Iowa, Massachusetts, Missouri, Nebraska, Nevada, New Jersey, New York, and Washington.

ment was conclusive as to the issue of liability, and that defendant was precluded from denying its negligence. The court, after noting that defendants had full opportunity to defend, that extensive depositions had been taken, and that many hundreds of interrogatories had been completed, granted plaintiff's motion for summary judgment despite the fact that the plaintiffs were not bound by the California judgment.[49]

In *Humphreys v. Tann*,[50] the Court of Appeals for the Sixth Circuit rejected the notion that a prior judgment dismissing the claims against the defendant precluded a different plaintiff in a subsequent suit based on the same factual occurrence from relitigating the issue of the defendant's negligence. The case involved a mid-air collision over Urbana, Ohio between a Trans World Airlines jetliner and a smaller Beech Baron aircraft owned by the Tann Company. Numerous lawsuits were filed in various state and federal courts. A number of the actions arising out of the air crash, including the Humphreys action, were transferred to the Southern District of Ohio, Dayton Division for coordinated or consolidated pretrial proceedings. The first action to come to trial resulted in a verdict for the plaintiff against TWA only and judgment was entered dismissing the actions against Tann by the plaintiff and TWA on its cross-claim. Tann then filed a motion in the Humphreys action seeking to preclude Humphreys from proving the accident resulted from the negligence of Tann on the basis of the prior judgment. The court, after a fine discussion of the recent evolution of the collateral estoppel doctrine, held:

> While the doctrine of collateral estoppel permits a prior judgment to preclude relitigation of an issue previously determined on its merits, it may be applied *in favor of* a stranger to the first action, but only *against* a party to that action. This has been true from the

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[49] One of Judge Hall's statements in this case is particularly helpful.

> Throughout the Federal Rules of Civil Procedure, the Judicial Code and other Statutes of the United States, the recurrent phrase is found "in the interest of justice."
>
> It would be a travesty upon that concept to now require these plaintiffs who are the survivors of passengers for hire on the United Air Lines plane to again re-litigate the issue of liability after it has been so thoroughly and consummately litigated in the trial court in the 24 consolidated cases tried at Los Angeles. There is every reason "in the interest of justice" for not invoking the rule requiring identity of parties [the mutuality of estoppel doctrine], and no reason in justice or law for invoking it in these cases.

216 F. Supp. at 728-29.

[50] 487 F.2d 666 (6th Cir. 1973).

> beginning of the judicial development of the theory of collateral estoppel. In Bernhard v. Bank of America it was stated that three questions are determinative of the issue and that all must be answered affirmatively. The third question, "Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" must be answered in the negative in this case. Humphreys' administrator is not bound, under this classic test of preclusion, by the verdict in the [prior] case. Writing for a unanimous Supreme Court in Blonder-Tongue v. University of Illinois Foundation Justice White stated the rule as follows:
>
> > Some litigants — those who never appeared in a prior action — may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position. 402 U.S. at 329, 91 S. Ct. at 1443.[51]

Finally, in *Garcy Corporation v. Home Insurance Company*,[52] the Court of Appeals for the Seventh Circuit held that although the defendants could not properly assert the judgment of a prior action against the plaintiff, the plaintiff could use the judgment in that prior action to preclude the defendants from relitigating the issue of defendants' knowledge. In this case, the plaintiff owned five buildings and was in the process of having them demolished. Before the wrecking crew had completed the destruction of all the buildings, they were destroyed by fire. The Aetna State Bank, the mortgagee of the buildings, brought an action against the defendant insurance companies. That action resulted in a decision holding that although the defendants were liable for the loss, that there was no damage on the theory that the buildings were under contract to be demolished.[53] The owner then brought his own action against the same defendants on the same insurance policies. The plaintiff, however, alleged additionally that he had been attempting to sell the most valuable building before the wrecking crew reached it and, that since the fire destroyed the building before the wrecking crew reached it, plaintiff had in fact suffered loss and that the defendants were liable to the extent of the policy coverage. The court said:

> Defendants did not plead collateral estoppel of the *Aetna* case against plaintiff. Such a pleading would have been inappropriate for

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[51] *Id.* at 671.

[52] 496 F.2d 479 (7th Cir. 1974).

[53] Aetna State Bank v. Maryland Casualty Co., 345 F. Supp. 903 (N.D. Ill. 1972).

> two reasons. First, there is no privity between mortgagor and mortgagee; defendants cannot raise collateral estoppel against a party which did not participate in the previous case. 1B Moore's Federal Practice § 0.411 [12], at 1673 (2d ed., 1974). Second, the difference between the factual contexts eliminates identify of issue on the damages question.[54]

However, the court also held that:

> In *Aetna*, Judge Marovitz found that Garcy Corp., the mortgagor, had given defendants notice of its plans for demolition. The finding was necessary to the court's holding that the mortgagee had not violated its duty under the notice provision in the mortgage clause quoted below. Plaintiff asserts collateral estoppel against defendant's present attack on the factual finding of notice of demolition. We believe plaintiff is entitled to invoke collateral estoppel despite the lack of mutuality of privity. Federal Savings & Loan Ins. Corp. v. Hogan, 476 F.2d 1182 (7th Cir. 1973); Factor v. Pennington Press, Inc., 230 F.Supp. 906 (N.D. Ill. 1963). While plaintiff was not a party to *Aetna*, defendants were; they had a full opportunity to litigate the issue of their knowledge of the proposed demolition. Defendants are now bound by the finding that they had knowledge.[55]

Thus this decision graphically illustrates that collateral estoppel may be used by a party who cannot be bound by a prior adjudication to preclude a party to the prior action from relitigating issues determined in the first case.

Applying these principles to the *Eisen* test case hypothetical, it seems apparent that a judgment holding the defendants liable to the plaintiff subclass in the first action to come to final judgment could be utilized, at least in the federal courts, to preclude the defendants from denying liability in subsequent actions brought by different subclasses. First, the basic issues of law and fact to be determined in the first action and in any subsequent action are identical.[56] Second, the parties against whom the plea of collateral estoppel is being urged in the subsequent actions would have had both the opportunity and the incentive to litigate all the issues in the first action.[57] Furthermore, a

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[54] Garcy Corporation v. Home Insurance Company, 496 F.2d at 480.

[55] *Id.* at 483.

[56] The issue in the *Eisen* case, aside from damages, was the liability of the defendants to members of the plaintiff class for charging and collecting the odd-lot differential which had allegedly been set at an excessively high amount. In the absence of any new, different or additional evidence, this issue would be the same in any action pursued by any of the subclasses.

[57] Defendants in the situation posed would be aware that the first action was a "test case" and that the members of the remaining subclasses were "lurking in the wings" awaiting the

ruling precluding the defendants from relitigating the issues decided in the first action would not create the possibility of anomalous results.[58] Thus, assuming that the issues were fully and fairly litigated in the test case situation, it would seem that at least some courts would allow members of nonlitigating subclasses to utilize a favorable judgment in the test case to preclude the parties opposing the action from relitigating any issues determined in the test case.

V. CONCLUSION

The suggestion of Judge Oakes that Eisen's class be divided into subclasses with one subclass pursuing the action as a "test case" seems to be simply unworkable. The apparent goal of the test case concept is to bind all interested parties to the judgment of a single action, making further litigation unnecessary. This goal however, is impossible to effectuate. It is not possible as a practical matter to solicit the agreement of all persons interested in the action to be bound by the judgment of the test case; it would require notification of the class members similar to that which made the pursuit of Eisen's action economically impossible. It is also impossible to bind all of the interested persons in the case to the judqment in the test case. Members of the nonlitigating subclasses cannot be bound by the result of the test case litigation as a matter of due process of law unless they receive notice of the action and are given an opportunity to appear.[59] Such notification is financially impractical. On the other hand, it is possible to envision a situation where the defendants could be bound by the result of the test case. That situation could occur in a jurisdiction where the doctrine of mutuality of estoppel was not applied and

decision. This knowledge, presumably would lead the defendants to fully litigate the issue of their liability. *See* Zdano v. Glidden Co., 327 F.2d 944 (2d Cir. 1964).

[58] There is no danger in the hypothetical test case situation that the application of collateral estoppel would create anomalous results since it has been assumed that the test class prevailed on the merits in the first instance. However, if the defendants prevailed on the merits in the first action to come to final judgment and subsequently, in an action brought by a different subclass, the plaintiffs prevailed on the merits of the case, the situation would be quite different. There, application of the *Bernhard* doctrine in the face of the nonuniform results would clearly be inequitable. No court should apply the *Bernhard* doctrine when to apply it would be to work an injustice.

As a practical matter this set of events would seem to be highly unlikely. If the defendants prevailed on the merits in the first instance it is doubtful that anyone could be found to subsidize a subsequent action by a different subclass involving exactly the same facts and law.

For an in depth discussion of the multiple-claimant anomaly, *see* Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965) and Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957).

[59] *See* discussion Part IV, A *supra*.

where nonparties to a case are allowed to assert the preclusive effect of a judgment offensively against a party to that judgment. In addition, the court in which the preclusive effect of the test case was urged would have to be convinced that the issues of the test case were fully and fairly litigated. Even in this ideal situation, the test case concept fails to achieve its ideal goal of binding all of the interested persons and making further litigation unnecessary. In all other situations, it would appear that not even the defendants would be bound by the result in the test case.

The only question remaining unanswered is whether the test case concept might serve some useful function even though the test case cannot have the ideal effect of binding all interested persons to the litigation. Division of a large class such as Eisen's into smaller subclasses would have both advantages and disadvantages; it would allow each subclass to litigate the rights of its members in a smaller more manageable action, but it would force the courts to try the same basic case several times, creating the risk of inconsistent adjudications.

A judgment in a test case that technically binds no one as a matter of law might practically be determinative of the rights of all the interested persons to the lawsuit. For instance, if the defendants prevail upon the merits of the test case, it is difficult to conceive of anyone who would undertake the costs of notice and attorney's fees to bring a substantially identical action by a different subclass. The judgment in the test case does have some precedential value due to the doctrine of *stare decisis* and it is unlikely that the decision in subsequent cases would differ from that in the first.

On the other hand, if the subclass prevailed on the merits of the test case, the roles are somewhat reversed, even assuming that none of the nonlitigating subclasses could utilize the judgment in the test case to preclude the defendants from relitigating the issues determined in the test case. The defendants could, of course, contest each and every subclass action that is brought—and presumably there would be a great number brought in the situation where the first subclass won the test case. Such a tactic might result in the defendants winning an occasional case against a subclass, although that possibility becomes more unlikely if the first action was well-litigated and intelligently decided. This strategy might also result in the total recovery by all subclasses being stretched out over a long period of time. However, there are costs involved in pursuing this course of action. First, there are the legal fees involved in fighting each subclass. But more importantly, many statutes under which class actions may be brought authorize the recovery of attorney's fees, for exam-

ple, the antitrust laws.[60] If the class action is brought under one of those statutes, the costs of this strategy is increased by the fees to be paid the counsel for the subclasses. It is thus conceivable that the test case judgment, if favorable to the subclasses, might place a great deal of pressure on the defendants to settle the remaining subclass actions.

Although the test case concept cannot, as a matter of law, perform its ideal function of binding all interested persons to the judgment in a single action, it would seem that the economics of pursuing a legal action might cause the test case idea to work rather well. Since the concept has at least some vitality, there is a place for it in the world of class actions. Class actions are a creature of equity,[61] and as such should be utilized to do justice. When a situation arises where the division of a class into subclasses is being considered, it should be borne in mind that the first subclass action to come to judgment may operate in effect as it were a test case, so that divisions should be made only when justice would be served thereby.

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[60] *E.g.*, Section 4 of the Clayton Act § 4, 15 U.S.C. § 15 (1970).

[61] *Eisen III* at 1023 (Judge Oakes, dissenting from denial of rehearing *en banc*).